Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Expanding the Economic and Innovation	)	Docket No. 12-268
Opportunities of Spectrum Through Incentive	)	
Auctions	)	
	)	

REPLY COMMENTS OF UNA VEZ MAS, LP

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Una Vez Mas, LP ("UVM"), the parent company of the licensees of 30 full power, Class A, and low power broadcast television stations, hereby submits reply comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1] As the Commission prepares to adopt rules designed to foster a successful incentive auction, it must focus both on maximizing broadcaster participation and preserving and protecting existing local broadcast television service throughout the auction and repacking processes.

I. INTRODUCTION AND SUMMARY

UVM is the largest U.S. affiliate group of the Azteca America television network. Through its nearly decade-long network/affiliate relationship with Azteca America, UVM has brought alternative Spanish-language programming to underserved audiences throughout the United States. UVM initially focused exclusively on operating low-power and Class A stations, with the goal of bringing a viable Spanish-language competitor to diverse markets, large and small. Now, its portfolio includes full-power stations in Houston, Dallas, and San Francisco.

[1] *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357 (2012) ("*NPRM*").

Over-the-air broadcasting remains particularly important for minority populations and lower-income households. A recent NAB study indicates that 28% of Asian households, 23% of African-American households, and 26% of Latino households are broadcast-only. In addition, 26% of homes with an annual income under $30,000 received TV signals solely over-the-air.

UVM agrees with the broad cross-section of commenters from the broadcast and wireless industries that have recognized that it is incumbent upon the Commission both to make participation in the voluntary auction attractive for broadcasters and, at the same time, to hold harmless television broadcasters that opt not to participate. To accomplish these dual goals, the Commission must valuate spectrum fairly, consistent with marketplace forces. It should not deprive broadcasters of the ability to obtain full value for their spectrum at auction or full protection during repacking based on arbitrary decision making or artificial deadlines. Whether in valuing stations or extending protections during repacking, the Commission must honor investment made in reliance on FCC policy and precedent as of the date of the auction, not the date of the Spectrum Act, including in Distributed Transmission System ("DTS") facilities. The Commission should afford broadcasters flexibility in creating channel sharing arrangements, including allowing stations to change their communities of license. The Commission cannot, consistent with the law, deny auction eligibility or repacking protection to Class A licensees whose status remains the subject of an appeal as of the auction date. Finally, the Commission cannot simply ignore low-power television stations and the minority communities that rely on them, and should protect low-power television service to the fullest extent possible under the law.

II. THE COMMISSION SHOULD ADOPT RULES THAT INCENTIVIZE BROADCASTER PARTICIPATION IN THE VOLUNTARY AUCTION.

The initial comments reflect widespread agreement that the Commission must establish auction policies and procedures that encourage broadcaster participation. By attracting broad participation in the largest markets, the Commission will unlock the value of spectrum assembled in the rest of the country through repacking alone. First and foremost, the Commission must offer broadcasters a fair price in exchange for all or some of the broadcasters' usage rights. UVM believes that the simplest and most equitable way to do this is by basing valuation on the station's impact on spectrum clearing, not its enterprise value. That means marketplace value based on relinquishment of 6 MHz of spectrum. It matters not to a wireless carrier whether the spectrum they receive comes from a full power or a Class A station, or from a station with high or low billings.

Should the Commission opt to link bidding prices to operating facilities, it should abandon the notion of assigning bidding prices to broadcast facilities licensed as of February 22, 2012, the date the Spectrum Act was signed into law. As the proposed treatment of Class A stations and stations with original construction permits as of February 22, 2012 indicates, the Spectrum Act sets a floor rather than imposing a ceiling on what coverage areas and populations served should be considered in establishing prices or extending protection during repacking. As the Commission itself states, "although Section 6403(b)(2) mandates preservation only of certain licensed facilities, we do not interpret it to prohibit the Commission from granting protection to additional facilities where appropriate." The Spectrum Act did not "mark[] the end of broadcasters' efforts and investments," and the industry did not "c[o]me to a standstill as of February 22, 2012."[2] Accordingly, UVM believes the Commission should base its bid prices on

[2] Comments of Entravision Holdings, LLC, at 5.

the station facilities in place at time of the auction rather than upon those facilities licensed as of February 22, 2012. Broadcast licensees have relied upon Commission policies in making investment decisions. For example, as demonstrated below, UVM has relied upon Commission policy (indeed, Commission *encouragement*) in developing a DTS to improve coverage for its Santa Rosa, CA full-power station, KEMO. The Commission cannot impose an arbitrary February 22, 2012 deadline for evaluating broadcast stations' value or the population and service area to which protection will be extended in repacking. Doing so would ignore the efforts and investment made by broadcasters in good faith reliance on Commission policy and precedent, whether in the context of building DTS or modifying facilities consistent with a Commission-issued construction permit. UVM agrees with Entravision that "[t]he February 22, 2012 cutoff proposed in the *NPRM* not only discounts the weight of the licensee reliance on Commission policy and process, it also discounts the true value of such stations."[3]

If the Commission is to maximize auction participation, it must also craft rules that afford broadcasters flexibility with respect to channel sharing. Doing so will increase the options available to broadcasters weighing whether or not to participate in the incentive auction process. The Commission has proposed prohibiting channel sharing that involves changes to a sharing station's community of license because such changes would be inconsistent with Section 307(b) of the Communications Act. While such an interpretation reflects the Commission's longstanding concern that such a license change not result in loss of service to a given community, it simply cannot be squared with the policy underlying the incentive auction, pursuant to which the Commission is encouraging broadcasters to abandon television service *altogether*. UVM supports proposals advanced by several commenters that, consistent with the

[3] *Id.*

public interest, the Commission should permit stations to change their community of license to the extent necessary to facilitate channel sharing with another station within the same Nielsen Designated Market Area ("DMA"). Permitting channel sharing in this manner would increase options for broadcasters–and thereby increase their willingness to participate in the auction– without undue disruption of the overall television broadcasting scheme.

III. THE FCC MUST PROTECT DISTRIBUTED TRANSMISSION SYSTEM FACILITIES AUTHORIZED AFTER FEBRUARY 22, 2012.

A. The FCC Has Championed the Benefits of Distributed Transmission Systems.

In November 2008, the Commission approved the groundbreaking technology for Distributed Transmission Systems ("DTS"), which allow a broadcaster to utilize multiple synchronized transmitters throughout a station's service area in order to "provid[e] optimum signal coverage for [its] viewers."[4] Importantly, DTS "involves complex new technology"[5] that affords broadcasters an efficient way to serve viewers located in areas where terrain features prevent a station's signal from reaching them.[6]

In the *DTS Order*, the FCC acknowledged the many benefits of DTS technology, including that DTS will: (1) "allow stations to reach viewers that would not otherwise be served by conventional means"; (2) "offer improved service within stations' coverage areas, including near the edges where signals can be low using traditional means"; (3) "improve reception of DTV signals on pedestrian and mobile devices, and enhance indoor reception, especially for suburban viewers"; (4) "offer[] an alternative to stations whose single, taller tower proposals

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[4] *Digital Television Distributed Transmission System Technologies*, Report and Order, 23 FCC Rcd 16731, ¶ 1 (2008) ("*DTS Order*").

[5] *GAO, Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce*, Telecommunications: FCC Should Take Steps to Ensure Equal Access to Rulemaking Information, GAO-07-1046 (Sept. 2007).

[6] *DTS Order*, ¶ 2.

may have been stymied by tower height and placement limits associated with aeronautical safety or local zoning concerns"; (5) "enhance spectrum efficiency"; (6) "facilitate the DTV transition" and let broadcasters "reach larger portions of their audiences by delivering signals to segments of the public who, absent DTS solutions, might not be able to receive a station's DTV signal over the air"; (7) "enhance DTV broadcasters' ability to compete with cable and satellite service and offer an effective over-the-air alternative for many viewers"; and (8) provide stations "the ability to continue to serve some of their analog viewers who would lose service as a result of the stations' [DTV] transition."[7]

In reliance on the Commission's policy, UVM has invested heavily in DTS for its station KEMO-TV, Santa Rosa, California (Fac. ID 34440). KEMO-TV completed the primary engineering to implement the new DTS facilities, and construction will be completed approximately six months after the City of San Francisco issues the necessary construction permit. Including the $100K spent to date, Una Vez Mas will spend between $1.6 and $1.9 million on KEMO-TV's DTS facilities. Once the DTS facilities are complete, the benefits to viewers will be significant.[8]

For KEMO-TV, the Commission authorized UVM to utilize two transmitter sites, one at Mt. St. Helena, the existing site of the currently-licensed facility, and a new site at Sutro Tower in San Francisco. The Santa Rosa service area is obstructed by very hilly terrain, and these DTS facilities will enable KEMO-TV to finally surmount this challenging environment and provide service to previously unserved viewers. The results speak for themselves. DTS will add nearly 3 million viewers, an increase of more than 51%, and Hispanic viewers will grow from 1,117,605 to 1,852,346, an increase of 66%.

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7 *Id.*, ¶ 14.

8 *See* CDBS File No. BMPCDT-20120504ADE (granted Aug. 27, 2012).

B. The Spectrum Act Affords the Commission Discretion to Protect Distributed Transmission Systems.

UVM agrees with the Commission that it has discretion to protect the millions of dollars invested by broadcasters in express reliance on the agency's own policies, promises, and incentives. The Spectrum Act states that "the Commission shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee" in the repacking process.[9] The statute goes no further and is ambiguous as to what protection should be given to DTS facilities authorized after February 22, 2012. Plainly, the statute does not foreclose protecting DTS facilities.

In "interpreting an ambiguous statute," it is an agency's role "to fill statutory gaps."[10] Acknowledging that the Spectrum Act stipulated the bare minimum protection which the Commission must afford broadcasters in the repacking process, the *NPRM* states that "[a]lthough section 6403(b)(2) mandates preservation only of certain licensed facilities, we do not interpret it to prohibit the Commission from granting protection to additional facilities where appropriate."[11] Indeed, the FCC has proposed to afford additional protection to both full-power television stations with unbuilt construction permits as of February 22, 2012 and Class A stations yet to convert their facilities to digital as of February 22, 2012.[12] For Class A stations, the agency reasons that not providing full protection "would be fundamentally unfair" and "deprive the

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9 47 U.S.C. § 1452(b)(2).

10 *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

11 *See NPRM*, ¶ 113.

12 *See NPRM*, ¶¶ 114-115.

public of important benefits."[13] For full-power stations, the FCC proposes protecting their reliance on the results of "an auction or NCE point system proceeding."[14]

The Commission then asks whether it "should protect any other authorized full power or Class A television station facilities in the repacking process."[15] UVM agrees with KAZN License, LLC that the full-power and Class A stations "are not distinguishable in any meaningful manner" from stations such as KEMO-TV with DTS facilities authorized after the Spectrum Act's enactment.[16] In fact, failure to protect DTS facilities in repacking would violate the Administrative Procedure Act ("APA"), which forbids the FCC from issuing a rule that is "arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law," or unsupported by record evidence.[17] To satisfy its obligations under the APA, the Commission "must examine and consider the relevant data and factors, and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[18]

First, it also would be "fundamentally unfair" not to protect DTS facilities authorized after the Spectrum Act. Just as no notice was provided to Class A stations undergoing the digital transition, no notice was provided to those stations wishing to utilize DTS facilities to improve their signal quality and reach previously unserved viewers in express reliance on Commission precedent. The *DTS Order* praised the many public interest benefits of DTS and did not establish a timeline for the implementation of DTS technology. The Spectrum Act should not

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13 *Id.*, ¶ 115.

14 *Id.*, ¶ 114.

15 *Id.*, ¶ 116.

16 Comments of KAZN License, LLC, Docket No. 12-268 (Jan. 25, 2013).

17 5 U.S.C. § 706(2)(A), (E).

18 *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

serve as an artificial predicate to strand the millions of dollars invested by broadcasters in cutting-edge DTS technology.

Second, not protecting DTS facilities also would "deprive the public of important benefits." The Commission's repeated public interest goals for broadcasters are "competition, localism, and diversity."[19] DTS technology promotes localism, finally giving broadcasters a tool to reach and provide local programming for over-the-air viewers including, in large measure, minority and low-income viewers, many of whom have been deprived of television reception because of previously insurmountable terrain challenges for years. DTS technology promotes competition, "enhanc[ing] DTV broadcasters' ability to compete with cable and satellite service."[20] And DTS technology promotes diversity, which is premised on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[21] Expanding stations' footprints to underserved viewers clearly achieves this goal.

Third, stations authorized to construct DTS facilities have just as much of a reliance interest as the stations the *NPRM* recognizes for Class A and full-power stations. The Commission's authorization of KEMO-TV's DTS facilities was not temporary and subject to an arbitrary, already-passed deadline. Rather, UVM relied upon the *DTS Order* and the subsequent authorization and rationally invested in the station's DTS facilities.

The similarities are apparent between stations authorized for DTS facilities and the Class A and full-power stations which the FCC reasonably proposes to afford protection beyond

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19 *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 1 (2011) ("*2010 Ownership NPRM*").

20 *DTS Order*, ¶ 14.

21 *2010 Ownership NPRM*, at ¶ 16 (internal quotations and citations omitted).

February 22, 2012. Indeed, the Commission may not "appl[y] different standards to similarly situated entities and fail[] to support this disparate treatment with a reasoned explanation and substantial evidence in the record[.]"[22] Failure to afford stations employing DTS technology equivalent treatment would improperly undermine the goals of the Communications Act[23] and would be arbitrarily discriminatory in violation of the APA.[24]

Should the Commission consider denying protection to DTS facilities, a desire for increased "flexibility" does not warrant robbing stations of full and fair auction price or repacking value.[25] It is stating the obvious that paying anyone less than full value increases the payor's flexibility – the payor will have more money. But increased benefits to the payor cannot justify cheating the payee, especially when the payee justifiably relied on the payor's prior authorization and policies. Such an explanation would be far from "reasoned" and would run counter to the "substantial evidence" accrued through years of Commission policy and precedent.

Moreover, the APA limits "rules" to agency actions with "future effect."[26] Here, UVM invested substantial resources in constructing DTS facilities based on a reasonable expectation – supported by Commission Orders and application grants – that its investments would not be eviscerated by the repacking process. Denying DTS facilities protection would be primarily

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22 *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

23 *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (even if a statutory provision is ambiguous, an agency's interpretation will be struck down if unreasonable); *see also Office of Commc'n of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985) (stating that one of the basic "dictates" of "[r]ational decisionmaking" is that an agency not "employ means that actually undercut its own purported goals").

24 *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *see also* FEC v. Rose, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

25 *See NPRM*, ¶ 114.

26 5 U.S.C. § 551(4).

retroactive, and thus *per se* unlawful, because it would "impair rights [UVM] possessed when it acted" to implement business plans following grant of its application.[27] And even if evaluated as merely "secondarily retroactive," rules denying DTS facility protection would "affect a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation" by significantly devaluing "substantial past investment incurred in reliance upon the prior rule."[28]

Further, failure to afford repacking protection for DTS facilities authorized after February 22, 2012 would violate the Fifth Amendment's Takings Clause. Foregoing this protection would deny UVM *all* economically beneficial use of its DTS authorizations and the expenditures made in reliance on them, thus amounting to a *per se* taking which, absent just compensation, would violate the Takings Clause.[29] In addition, UVM has a protected property right in the value of the investments that it made to obtain and implement the DTS facilities for KEMO-TV, as well as the reasonable expectation that DTS would substantially expand the station's viewership, ratings, and advertising revenue. FCC action that strips KEMO-TV's DTS facilities of repacking protection and these significant benefits would "interfere[] with [its] distinct investment-backed expectations" and thus constitute an unlawful regulatory taking.[30]

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[27] *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

[28] *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

[29] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[30] *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

IV. THE COMMISSION SHOULD ADEQUATELY PRESERVE THE COVERAGE AREA AND POPULATION SERVED OF DTS STATIONS IN THE REPACKING PROCESS

Assuming the Commission affords repacking protection to DTS facilities authorized after February 22, 2012, the proper metrics for coverage area and population served must be utilized to ensure preservation of the unique qualities provided by DTS.

A. The "Coverage Area" Standard for DTS Stations Should Be Based Upon Rules 73.626(d)-(e).

The *NPRM* proposes to define "coverage area" in terms of 47 CFR § 73.622(e). Though the *NPRM* addresses "coverage area" for DTV stations and Class A stations, it does not contemplate what the "coverage area" should be for a station employing DTS technology. As with DTV stations and Class A stations, the "coverage area" for DTS stations should mean "the area within which a [DTS station] is protected from interference."[31]

For this purpose, Rules 73.626(d)-(e), both adopted in the *DTS Order*, are most analogous to Rule 73.622(e) and should be the fundamental "coverage area" standards for DTS stations. Rule 73.626(e) states that "the population served by a DTS station shall be the population within the station's combined coverage contour, excluding the population in areas that are outside both the DTV station's authorized service area and the Table of Distances Area[.]"[32] As an alternative to the Table of Distances Area, however, the *DTS Order* permits DTS stations to use the "largest station" provision in Rule 73.622(f)(5), which "provide[s] the same geographic coverage area as the largest station within [its] market."[33] The *DTS Order* also provides that "DTS stations seeking to maximize under this rule to cover an area greater than can be covered using the values in the Table of Distances may request an increase in ERP and

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31 *NPRM*, ¶ 99.

32 47 C.F.R. § 73.626(e).

33 47 C.F.R. § 73.622(f)(5); *DTS Order*, ¶ 35.

antenna HAAT values to determine the circle within which all DTS station coverage contours must be contained. In other words, DTS stations may obtain the same coverage under the rule as would a single-transmitter station, provided the DTS service would not result in new interference."[34] In addition, the *DTS Order* permits DTS stations to request changes to their reference points, the points from which the areas circumscribed by circles based on the Table of Distances or the Largest Station alternative are determined.[35] Hence, Rules 73.626(d)-(e), in combination with portions of the *DTS Order* not fully represented in the rule text,[36] provide the proper "coverage area" standard for stations utilizing DTS facilities. Protecting DTS service areas under these rules is necessary to properly recognize the investments that station owners like UVM have made to increase their coverage areas and to provide service to previously unserved viewers in remote areas.

For the reasons discussed above, failure to protect the coverage area of DTS facilities under these rules would be impermissibly retroactive.[37] DTS is a complex, cutting-edge technology, and UVM has made significant investments in KEMO-TV's DTS applications and preliminary engineering implementations. Denying KEMO-TV the proper coverage area would categorically "impair" and eliminate the rights UVM possessed when it made such investments, which would be primarily retroactive and *per se* unlawful.[38] It would, at a minimum, amount to "unreasonable secondary retroactivity," by "mak[ing] worthless substantial past investment incurred in reliance upon the prior rule."[39] Moreover, a decision to improperly determine the

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34 *DTS Order*, ¶ 35.

35 *Id.*, ¶ 29.

36 *Id.*, ¶¶ 29, 35.

37 *See supra* Section III.B.

38 *DIRECTV, Inc.*, 110 F.3d at 825-26.

39 *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J. concurring).

coverage area of DTS facilities would either eviscerate or at the very least "interfere[] with [UVM's] distinct investment-backed expectations" and represent an unconstitutional taking.[40]

B. The Spectrum Act Mandates that the Commission Undertake "Reasonable Efforts" to Preserve the Same Specific Population Served in the Repacking Process.

UVM agrees with the National Association of Broadcasters ("NAB") that the Spectrum Act mandates that the Commission provide "each broadcaster with the *same coverage* and *same population* that it now serves."[41] The statute prescribes that "the Commission shall make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee . . . ."[42] Many of UVM's viewers are Hispanic, low-income viewers who rely on over-the-air broadcasting. Therefore, it is crucial that the Commission adopt "Option 2," modified as proposed by NAB, and interpret "reasonable efforts" to include preserving service to the same specific viewers for each eligible station.[43]

Causing "less disruption to viewers"[44] is of paramount importance for Spanish-language speakers because a disproportionately large segment of this population living in the United States relies exclusively on over-the-air television for video service compared to the general population.[45] UVM agrees with Univision that "it is vitally important that the Commission's repacking rules avoid doing harm to Hispanic viewers and the Spanish-language stations that

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40 *Loretto*, 458 U.S. at 426; *Penn Central*, 438 U.S. at 124.

41 Comments of National Association of Broadcasters, at 19.

42 47 U.S.C. § 1452(b)(2).

43 *See NPRM*, ¶ 106.

44 *Id.*

45 *See* Comments of Univision, at 3 ("26 percent of all Hispanic households—or 3.3 million U.S. households — rely on free, over-the-air television exclusively, rather than subscribing to [MVPD] services. . . [A]mong Hispanic households that prefer to speak Spanish at home, one-third rely on over-the-air television exclusively.").

serve them."[46] It would be a disservice to this burgeoning, yet still underserved segment of the U.S. population to eliminate an important source of programming. Moreover, preserving specific populations is an especially acute concern for stations employing DTS technology, many of which have invested in the technology to reach specific viewers who could not receive those stations' signals because of terrain impediments.

V. THE FCC SHOULD MAKE ALL REASONABLE EFFORTS TO PRESERVE THE COVERAGE AREA AND POPULATION SERVED OF LOW POWER TELEVISION STATIONS.

UVM joints numerous commenters in urging the Commission to protect the coverage areas and populations served of low-power television stations during the repacking process.[47] As the Commission has recognized, "[l]ow power television stations are a source of diverse and local television programming…."[48] Indeed, UVM's LPTV stations provide quality niche programming to a wide variety of racial and ethnic minorities residing in underserved or unserved areas. UVM station KAMM-LP in Amarillo, Texas, for example, provides Spanish-language content that is not available elsewhere in the market. Meanwhile, UVM station WUVM-LP in Atlanta provides local content such as "Noticiero Azteca America Local"

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[46] Comments of Univision, at 4.

[47] *See, e.g.,* Comments of Advanced Television Broadcasting Alliance, at 5 ("If the Commission then decides to move forward, it should ensure that LPTV stations will be accommodated as part of the repacking process. The FCC has acknowledged that it has authority to protect LPTV stations during the repacking process) (internal citation omitted); Comments of International Communications Network, Inc., at 2 ("…the Commission must recognize the importance in the communications world of LPTV service to local communities by minority, independently-owned operators and the consequent need to utilize every available means to preserve that service while repacking the spectrum after the incentive auction."); Comments of MSGPR Ltd. Co. at 5 ("[T]he proposed incentive auction, …, must protect the pre-auction spectrum usage rights of all operating LPTV & translator operators."); Comments of The Named State Broadcasters Associations, at 9 ("There are potentially thousands of television translator and LPTV stations, and hundreds of thousands of citizens who rely upon those stations, that may be adversely impacted by this proceeding. The Commission should take their existence and the continued need for their service into full and favorable consideration under the goal of Section 307(b) as it exercises its discretion to repack stations in a circumscribed way."); Comments of Weigel Broadcasting Company, at 1 (the Commission must "make all reasonable efforts to avoid creating 'short markets' in which viewers in a local television market would lose access to low power television stations….").

[48] *NPRM*, ¶ 358.

newscasts, "Fanatico Sports" local sports news programs, and Spanish-language broadcasts of Atlanta Silverbacks professional soccer matches.

LPTV stations represent a critical thread in the nationwide tapestry of free, over-the-air broadcast television. Millions of Americans depend on over-the-air television to meet their informational and entertainment needs, and they are doing so in *increasing* numbers. In 2012, 54 million Americans relied on an over-the-air signal for television reception, up from 46 million just a year prior.[49] In addition, recent studies have confirmed that minorities and low-income Americans disproportionately rely on free, over-the-air television when compared to non-minorities and higher-income individuals.[50] These vulnerable populations would therefore be most affected by the loss of LPTV service. Congress sought to prevent just such an outcome in passing the Spectrum Act, which acknowledges the importance of over-the-air broadcasting and requires the Commission to protect it.[51] Because LPTV stations are no less vital to the broadcasting service than their full-power and Class A counterparts, the Commission must make all reasonable efforts to preserve the coverage areas and populations served by LPTV stations during repacking.

LPTV stations are also vital to furthering one of the Commission's primary policy goals – ownership diversity. As the Commission has long recognized, "minorities and women own broadcast stations in disproportionately small numbers." [52] Because of lower start-up costs and

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[49] Press Release, National Association of Broadcasters, *Over-the-air TV Viewership Soars to 54 Million Americans* (June 18, 2012) ("According to new research by GfK Media, the number of Americans now relying on over-the-air (OTA) television reception increased to almost 54 million, up from 46 million just a year ago.") (internal citation omitted), *available at* http://www.nab.org/documents/newsroom/pressRelease.asp?id=2761.

[50] *Id.* ("In all, minorities make up 44% of all broadcast-only homes. … Lower-income households also trend towards broadcast-only television, with 26% of homes with an annual income under $30,000 receiving TV signals solely over-the-air.").

[51] *See* Comments of Lima Communications Corporation, et al. at 2.

[52] *Commission Seeks Comment on Broadcast Ownership Report*, Public Notice, DA 12-1946 at ¶ 2 (MB, rel. Dec. 3, 2012); *see also 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership*

barriers to entry, however, the LPTV service fosters ownership opportunities for minority and female broadcasters. The lower operating costs and regulatory burdens associated with LPTV also allow for more sustainable ownership. Declining to protect low power television stations during repacking would only exacerbate the problem of low minority and female ownership.

Just 20 months ago, the FCC sought to "hasten the low power television conversion to digital" and set September 1, 2015 as the LPTV digital transition date.[53] UVM has made significant investments in its LPTV stations to facilitate this FCC-mandated change, but the practical effect of denying them protection would be station extinction. That is why, for the same reasons discussed above, denying protection to low power television stations would be primarily retroactive and *per se* unlawful, or, at very least, "make worthless substantial past investment incurred in reliance upon the prior rule" and amount to unreasonable secondary retroactivity.[54] Moreover, Commission rules which failed to protect LPTV stations would almost certainly sound their death knell, especially in congested markets. Such denial of all economically beneficial use of their licenses and the expenditures made in reliance on them – including FCC orders incentivizing a digital transition which would be rendered moot by this proceeding – amounts to a *per se* taking which, absent just compensation, would violate the

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Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, Report on Ownership of Commercial Broadcast Stations, DA 12-1667 at ¶¶ 5, 7 (M.B. rel. Nov. 14, 2012) ("Women collectively or individually hold a majority voting interest in 6.8 percent of the nation's full power commercial television stations. Racial minorities, meanwhile, hold a majority interest in 2.2 percent of such stations.").

53 *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Second Report and Order, 26 FCC Rcd 10732, ¶¶ 6-7 (2011) ("*LPTV DTV Second Report and Order*").

54 *Bowen*, 488 U.S. at 220 (Scalia, J. concurring).

Takings Clause.[55] At the very least, such action would constitute an unconstitutional regulatory taking.[56]

VI. THE COMMISSION MUST RESPECT A BROADCASTER'S STATUS UNTIL ANY CHANGE TO SUCH STATUS BECOMES FINAL AND UNAPPEALABLE.

The *NPRM*'s proposal to exclude from reverse auction eligibility certain Class A stations which have been downgraded to low-power status regardless of "whether or not the modification order is final and appealable" runs counter to the Communications Act, the Constitution, and the Spectrum Act[57] and cannot be sustained as a matter of law.

Pursuant to Rule 1.87, the Commission has issued several Show Cause Orders by which the Commission seeks to modify Class A stations to LPTV status based on a station's failure to meet ongoing Class A eligibility requirements.[58] As described in its Response to the Show Cause Order, which UVM attaches for inclusion in this docket and hereby incorporates by reference in its entirety, UVM believes that any action taken by the Commission to modify the licenses for five of its California Class A stations to reflect low-power television status would be arbitrary and capricious, counter to the Community Broadcasters Protection Act of 1999, and inconsistent with Commission policy and precedent.[59]

Nonetheless, should the Commission issue a modification order,[60] the Communications Act explicitly provides UVM a right to judicial review.[61] Specifically, the Act holds that

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55 *See Loretto*, 458 U.S. at 426.

56 *See Penn Central*, 438 U.S. at 124.

57 *See NPRM*, ¶ 75, n.105.

58 *See, e.g., Reclassification License of Class A Television Stations KASC-CA Atascadero, California KDFS-CA Santa Maria, California KLDF-CA Lompoc, California KPAO-CA Paso Robles, California KSBO-CA San Luis Obispo, California*, 27 FCC Rcd 2601 (M.B. 2012).

59 Una Vez Mas, LP, Response to Order to Show Cause (filed Apr. 23, 2012) ("*Show Cause Response*") (Attached as Exhibit A).

60 *See* 47 C.F.R. § 1.87(i).

"[a]ppeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . [b]y the holder of any construction permit or station license which has been modified or revoked by the Commission."[62] Should UVM obtain a favorable ruling, the Communications Act enumerates that the court "shall remand the case to the Commission *to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto* . . . ."[63] Simply put, the Communications Act is unambiguous and does not give the Commission discretion to strip away UVM's statutory and due process right to judicial review.

The *NPRM*'s proposal ignores this statutory mandate and instead, for all intents and purposes, would make the staff's Class A modifications final and unappealable. Under the FCC's proposed scheme, UVM would have no recourse should it exercise its right to appeal and the D.C. Circuit issue an Order for Remand reinstating a station's Class A status after the reverse auction commences. In that scenario, the auction would have already begun, leaving qualified UVM Class A stations ineligible and causing irreversible harm.

That is why the *NPRM*'s proposal to effectively finalize its Class A downgrade would also violate the Fifth Amendment's Takings Clause. UVM has a protected property right in the value of the investments that it made to obtain and implement its Class A licenses, as well as the reasonable expectation that it might be able to obtain substantial auction proceeds. FCC action that strips auction eligibility and these significant benefits from these Class A stations would "interfere[] with [UVM's] distinct investment-backed expectations" and thus constitute an

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61 *See* 47 U.S.C. § 402(b)(5).

62 *Id.*

63 47 U.S.C. § 402(h) (emphasis added).

unlawful regulatory taking.[64] Moreover, should these stations be denied repacking protection, this agency action would obliterate *all* economically beneficial use of the licenses and the expenditures made in reliance on them, constituting a *per se* taking which, absent just compensation, would also violate the Takings Clause.[65]

Further, the FCC's repacking model must account for any Class A stations subject to a reclassification order that remains subject to appeal. The Spectrum Act mandates protection of a Class A station's coverage area and population served as of February 22, 2012.[66] Despite the issuance of the Show Cause Order, UVM's stations had Class A status as of that date. Accounting for all Class A stations with pending administrative or judicial appeals of decisions downgrading their status in the repacking model is the only way to provide recourse for a station that successfully appeals the Commission's reclassification order.

In its Response to the Show Cause Order, UVM demonstrated how its stations sought and were granted special temporary authority ("STA") to temporarily cease operations, yet the Show Cause Order suggested that Class A stations must miraculously fulfill certain programming obligations even when off the air. UVM argued that the Community Broadcasters Protection Act of 1999 (the "CBPA") did not impose minimum operating requirements exceeding those applicable to full-power stations. In addition, UVM demonstrated that the FCC's Show Cause Order conflicted with the clear language and intent of the CBPA to create *permanent* Class A licensees. Should the Commission follow through with its Show Cause Order, the *NPRM*'s proposal would leave UVM, and other similarly situated Class A licensees, no alternative but to go to court and seek an injunction, which could disrupt the entire incentive auction process.

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64 *Penn Central*, 438 U.S. at 124.

65 *See Loretto*, 458 U.S. at 426.

66 47 U.S.C. § 1452(b)(2).

VII. CONCLUSION.

The Commission's rules must focus both on maximizing broadcaster participation and preserving and protecting existing local broadcast television service throughout the auction and repacking processes. DTS technology, constructed in reliance on FCC policy and guidance, permits viewing by underserved consumers in rural areas. Failure to protect these state-of-the-art facilities would be arbitrary and capricious and impermissibly retroactive in violation of the APA and amount to an unconstitutional taking. UVM agrees with commenters that the Commission must strive to protect the coverage areas and populations served of low-power television stations, which provide niche programming to many low-income households, during the repacking process. Finally, excluding from reverse auction eligibility certain Class A stations which have been downgraded to low-power status without giving full effect to their due process right to appeal violates the Communications Act, the Constitution, and the Spectrum Act.

Respectfully submitted,

By: */s/ Terence Crosby*
Terence Crosby
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Una Vez Mas, LP
703 McKinney Avenue
Suite 240
Dallas, Texas 75202

March 12, 2013

Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reclassification of License of	)	
Class A Television Stations	)	
	)	
KASC-CA	)	Facility ID No. 10537
Atascadero, California	)	
	)	
KDFS-CA	)	Facility ID No. 31351
Santa Maria, California	)	
	)	
KLDF-CA	)	Facility ID No. 41126
Lompoc, California	)	
	)	
KPAO-CA	)	Facility ID No. 68663
Paso Robles, California	)	
	)	
KSBO-CA	)	Facility ID No. 31354
San Luis Obispo, California	)	
	)	

To: Office of the Secretary
Attn: Barbara A. Kreisman, Chief, Video Division, Media Bureau

RESPONSE TO ORDER TO SHOW CAUSE

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SUMMARY

Una Vez Mas, LP ("UVM"), parent of the licensees of the above-referenced Class A television stations (the "Stations"), respectfully submits that licenses for the Stations should not be modified as proposed by the Order to Show Cause (the "*Show Cause Order*") issued on March 15, 2012. The *Show Cause Order* is premised entirely on the fact that the Stations were off the air for certain periods between 2006 and the January 2012. As a result, the *Show Cause Order* states, it was incumbent upon the licensees to notify the Commission that the Stations were unable to fulfill their obligations under Section 73.6001 of the Commission's rules, and that the licenses should now be modified to specify low power television rather than Class A status.

The proposed modification, which is tantamount to license revocation given the current broadcast television climate, cannot stand as a matter of law or as matter of policy. In the Community Broadcasters Protection Act ("CPBA"), Congress expressly recognized the value of certain low power television stations in providing programming to unserved and underserved local communities. Acutely aware of their vulnerability in light of the upcoming digital television transition, Congress offered a safe haven for qualifying LPTV stations—protected Class A status. The CPBA made clear that Class A status was to be *permanent*, provided Class A licensees abided by rules governing full power television stations.

Since it acquired the Stations in 2006, UVM has and continues to abide by rules governing full power television stations. Given the unique characteristics of the Santa Barbara-Santa Maria-San Luis Obispo market, the company made a $2.5 million investment and set out to create a local network primarily comprised of the Stations, one that would bring communities within the DMA Spanish-language local and network programming and provide a viable advertising vehicle from which to generate sufficient revenue to continue operations. Initially, this required taking the Stations off the air to repair equipment and to build new microwave facilities. Later, the the Santa Barbara hub facility burned to the ground during the so-called "Tea Fires," forcing the company to

again take the Stations dark. As UVM attempted to right itself after the utter destruction caused by the wildfires, it faced new impediments—no clear path for an LPTV digital transition, a ravaged economy, and an operating environment in which LPTV stations suffered unprecedented viewership and advertising losses. Available capital dried up completely. UVM therefore availed itself of what it, and other similarly situated Class A television operators, based on longstanding Commission precedent, believed to be a mechanism through which to conserve resources, preserve its licenses, and position the Stations for return to air.

The Stations never ceased operations for more than the clear, 12-month statutory period established by Congress. Moreover, the Stations never ceased operations without seeking appropriate special temporary authority ("STA") from the Commission. At the same time, the Commission never provided UVM with any indication whatsoever that it risked losing Class A status for any of the Stations. Now, reversing precedent and in contrast to its STA approvals, the Commission appears to be of the view that Class A stations must operate for 18 hours every day and provide requisite programming regardless of their circumstances or their status will be revoked. As a matter of law, this position impermissibly singles out Class A television stations for disparate treatment and conflicts with the clear language and intent of the CBPA.

History is now repeating itself and the continued existence of LPTVs is questionable, with spectrum auctions and repacking on the horizon. In this environment, investment in stations other than Class A stations has become increasingly unlikely. The Commission's proposed modification, therefore, is a draconian penalty for non-compliance with a policy that is suspect and ambiguous at best.

With Congress' promise of continued Class A protection, a set date for the digital transition, and a slowly improving economy, UVM returned the Stations to the air permanently in January 2012, and they are providing alternative Spanish-language programming, including news and public affairs programming, to a burgeoning Hispanic population with limited viewing choices. As a matter of policy, dooming these Class A

stations to uncertain LPTV status and jeopardizing their continued ability to serve the Hispanic population in these markets would contravene purpose of both the CBPA and the Commission's own diversity and localism objectives.

The Commission's proposed action singles out Class A stations for unfair, unjust, and disparate treatment, frustrates Congress' intent in issuing permanent Class A licenses, and likely will deprive Hispanic viewers in the relevant market of a valuable programming option going forward. For these reasons, the Commission should not modify the licenses for the Stations to low power television status.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reclassification of License of	)	
Class A Television Stations	)	
	)	
KASC-CA	)	Facility ID No. 10537
Atascadero, California	)	
	)	
KDFS-CA	)	Facility ID No. 31351
Santa Maria, California	)	
	)	
KLDF-CA	)	Facility ID No. 41126
Lompoc, California	)	
	)	
KPAO-CA	)	Facility ID No. 68663
Paso Robles, California	)	
	)	
KSBO-CA	)	Facility ID No. 31354
San Luis Obispo, California	)	
	)	

To: Office of the Secretary
Attn: Barbara A. Kreisman, Chief, Video Division, Media Bureau

RESPONSE TO ORDER TO SHOW CAUSE

Una Vez Mas, LP, managing member of Una Vez Mas Atascadero License, LLC, licensee of KASC-CA, Atascadero, California (Facility ID No. 10537), Una Vez Mas Santa Maria License, LLC, licensee of KDFS-CA, Santa Maria, California (Facility ID No. 31351), Una Vez Mas Lompoc License, LLC, licensee of KLDF-CA, Lompoc, California (Facility ID No. 41126), Una Vez Mas Paso Robles License, LLC, licensee of KPAO-CA, Paso Robles, California (Facility ID No. 68663), and Una Vez Mas San Luis Obispo License, LLC, licensee of KSBO-CA, San Luis Obispo, California (Facility ID No. 31354) (the "UVM Licensees" and, collectively, "Una Vez Mas"), by its attorneys,

hereby responds to the *Order to Show Cause* issued by the Chief, Video Division, Media Bureau on March 15, 2012[1] with respect to the above-referenced stations (the "Stations").

I. INTRODUCTION AND SUMMARY

The Commission proposes to terminate the Stations' Class A status for their alleged failure to comply with the Commission's programming and operating requirements for Class A stations. The alleged non-compliance, the record demonstrates, occurred during periods when the Stations were operating under special temporary authority ("STA") to remain silent or had submitted timely notices of silent status with requests for STA. As will be demonstrated herein, the *Show Cause Order* wrongly supposes that the minimum operating requirements for Class A stations exceed those applicable to full-power stations. Moreover, the *Show Cause Order* suggests that Class A stations must miraculously fulfill certain programming obligations *even when they are off the air*.

Una Vez Mas does not dispute that a series of circumstances beyond its control (including the devastating California wildfires of 2008) prevented the Stations from broadcasting during several discrete periods over the past five years. Una Vez Mas duly reported every outage to the Commission in its applications for special temporary authority, which for several years were granted, until the agency mysteriously and without notice changed its procedures.[2] Una Vez Mas believed in good faith and with

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1 DA 12-414 (the "*Show Cause Order*").

2 According to CDBS, the FCC has not acted affirmatively to grant silent authority to a Class A television station since mid-December 2009. (A search of CDBS April 23, 2012 using "Class A Television" and "Silent STA" as values for "Form Number" and "Service," respectively, yielded 438 results showing that the last Silent STA authorization was granted on December 14, 2009. Since that date, all requests for Silent STA remain "accepted for filing" or have been dismissed.) It is generally assumed when Media Bureau staff receives but does not act upon licensee requests that those requests have been granted. Requests are routinely received by the staff, for example, seeking extensions of time to file post-

sound reason that it was following a process permitted by the Commission's rules (and, in fact, specifically prescribed in public notices addressing the precise circumstances in which the Stations found themselves). In no instance did the Stations cease operations for more than the clear, 12-month statutory period established by Congress when it dictated the circumstances under which a broadcast licensee's failure to operate would automatically result in the loss of its license. Moreover, in no instance did the Stations cease operations without seeking appropriate authority from the Commission. Yet, the unprecedented and draconian action proposed by the Commission would terminate the Stations' status as interference-protected, displacement-immune television facilities and would reduce them to secondary status low-power television ("LPTV") stations, subject to displacement by full-power and Class A television stations, with no safeguard from interference, and no assurance of future frequency availability or, indeed, continued existence. In other words, the Commission's proposed sanction is tantamount to license revocation and is entirely inappropriate under the circumstances. For the reasons described below, Una Vez Mas respectfully requests that the Commission preserve Class A status for each of the Stations.

II. BACKGROUND

A committed broadcaster, Una Vez Mas is the largest U.S. affiliate group of the Azteca America television network. Through its nearly decade-long network/affiliate relationship with Azteca America, Una Vez Mas has brought alternative Spanish-language programming to underserved audiences throughout the United States. Una Vez

consummation ownership reports. No action is taken on these requests, which are in effect, granted by default. In the case of requests for silent authority, the Commission takes the action of changing the status of the requesting station in CDBS from "Licensed" to "Licensed and Silent," so that no station could be presumed to be on the air that has filed such a request.

Mas initially focused exclusively on operating low-power and Class A stations, with the goal of bringing a viable Spanish-language competitor to diverse markets, large and small.

Since the inception of low-power television in 1982, LPTV licensees like Una Vez Mas have played an invaluable role by operating in unserved and underserved areas, increasing the diversity of broadcast voices, and providing niche programming to a wide variety of racial and ethnic minorities. By 1999, byproducts of the looming DTV transition threatened to displace LPTV stations—first from digital companion channels issued to full-power stations and then from the consolidation of spectrum available for broadcast television from 59 channels to 51. This uncertain future created a substantial hardship for many LPTV stations, which, given their vulnerability to channel displacement and the potential unavailability of alternative frequencies, struggled to obtain the funding necessary to develop viable, long-term business plans. Congress, recognizing the plight of these stations, sought to resolve the uncertainty surrounding their operation by creating a "Class A" television service.

Of course, the history of Class A television stations has been a series of actions and reactions to threats of spectrum scarcity. The service was created by Congress in 1999 to provide certain qualifying LPTV stations a permanent, secure home—in other words, a safe haven—in the face of the spectrum crunch triggered by the full-power digital television transition. Through the Community Broadcasters Protection Act of 1999 (the "CBPA"), Congress offered a process through which certain LPTV stations could obtain a "permanent" Class A license, which would provide all of the relevant benefits and responsibilities of a full-power television license to stations despite the

technical limitations inherent in LPTV operations, based on the finding that such stations played a critical role in bringing programming to underserved audiences.

Because of concerns about the number of potential Class A stations, the CBPA prescribed specific criteria for the Commission to apply in determining whether an LPTV station was eligible for Class A status. Namely, for the 90 days prior to the CBPA's adoption, LPTV stations were required to demonstrate that they broadcast for a minimum of 18 hours per day and provided at least 3 hours of programming each week produced within the market area served by the station. In addition, from the time that an LPTV station applied for Class A status, it was required to comply with all applicable Commission rules for full-power television stations.

Unfortunately, the new world that greeted the permanent Class A station was not without its own impediments. Although Class A stations were no longer secondary to full-power stations, they still faced questions about their digital transitions. For instance, an early proposal would have required all LPTV stations, including Class A stations, to relinquish analog service and flash cut to digital at a time when many viewers (including minority populations and viewers in rural areas) still relied heavily on over-the-air signals and could only receive analog broadcasts. When manufacturers of digital-to-analog converter boxes were not required to pass through analog signals, LPTV stations were thrown into limbo, potentially unable to reach viewers and sustain ratings. Uncertainty about the timing of the low-power digital transition persisted *until just last year*, when the FCC announced a September 2015 date for the completion of the digital transition for LPTV stations, including Class A stations.

Combined with the ambiguity surrounding the low-power digital transition, Class A stations have suffered acutely the ravages of the worst economic downturn since the great depression.[3] The capital market for broadcast stations became virtually non-existent, and revenues tanked.[4] Class A and LPTV stations, with their more limited reach, bore the brunt disproportionately, as advertising dollars became especially sparse, with most buys benefiting larger, more established stations. Moreover, unlike their full-power counterparts, Class A stations were not entitled to must-carry status, limiting their carriage on cable and satellite systems and the commensurate ability to generate advertising revenue. At the same time, the Commission issued its National Broadband Plan, and along with it came the specter that any investment made in Class A or LPTV stations would be lost completely to television spectrum reclamation.[5]

In recent years, this perfect storm of income-limiting, capital-limiting, carriage-limiting realities has tested the survival skills of all LPTV licensees, including Class A stations. It is not an exaggeration to state that most LPTV broadcasters have struggled to pay basic operating expenses during this period, much less maintain reserve accounts for any unanticipated technical expenses the stations may have incurred. With the uncertain timing of the digital transition and the risk of losing spectrum always looming in

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3 *See, e.g.*, Suzy Khimm, *The Great Recession in Five Charts*, Washingtonpost.com WonkBlog, Sept. 13, 2011, *available at* http://www.washingtonpost.com/blogs/ezra-klein/post/the-great-recession-in-five-charts/2011/09/13/gIQANuPoPK_blog.html ("Real median income had a record drop between 2009 and 2010, marking an even more rapid decline than in previous recessions. Income had been edging downward since the end of the Clinton administration, but the recent recession essentially wiped out more than a decade's worth of gains.").

4 Two years after the collapse of the market in 2008, financing for broadcasting still remained illusory. "Financing For Broadcast Deals Said Still Hard to Come By," *Communications Daily,* p. 5, April 8, 2010.

5 Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan, at ch. 5 (2010) ("National Broadband Plan").

background, decisions to repair and/or replace analog infrastructure when it failed posed Solomon-like questions for these licensees. Ironically, for LPTV stations, history is today repeating itself; LPTV stations find themselves in the same predicament as they did more than a decade ago, when Congress stepped in to preserve qualifying stations because of their unique role in bringing valuable programming to underserved communities. For Class A stations, there is only now the promise of continued protection.[6]

It is in this context that the actions of Una Vez Mas with respect to the Stations must be considered. Not unlike similarly-situated Class A and LPTV operators, when the economy hit bottom, the company struggled to find the financial resources necessary for operating expenses and investment in equipment in markets generating little to no revenue. The *Show Cause Order* superficially characterizes Una Vez Mas' actions to take the stations dark as "a business decision." But the complete picture is far more complex. The devastating impact of the wildfires was far-reaching, revenues for Class A and LPTV stations in these markets dried up, early conversion to digital made no sense from a viewer perspective (and the resources simply were not there, regardless), and acquiring money for equipment expenditures that might prove obsolete was simply impossible. Moreover, Una Vez Mas was presented with no opportunity to sell any of the Stations at any reasonable price. Access to capital was extremely limited, and when

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[6] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, at § 6001(6) (2012) ("The term 'broadcast television licensee' means the licensee of—(A) a full-power television station; or (B) a low-power television station that has been accorded primary status as a Class A television licensee . . . ."). The legislation provides that Class A stations are eligible to participate in the incentive auction process and that their status will be preserved during eventual repacking of the television broadcast spectrum.

available, money was targeted only for investment in full-power broadcast television stations with must-carry rights and more expansive, digital signals.

The Stations are all located within the Santa Barbara-Santa Maria-San Luis Obispo Designated Market Area ("DMA"), and their fortunes are inextricably intertwined with those of Una Vez Mas' Santa Barbara station. The Stations are nestled along California's Central Coast, with Los Angeles to the south and San Francisco to the north. Geographically, the relatively small communities of Santa Maria, Lompoc, Paso Robles, and San Luis Obispo are isolated by the Pacific Ocean to the west and the Santa Ynez Mountains to the east. They are joined by similar economies based upon farming, ranching, oil production and tourism. Because of the sheer size of the DMA and the distance between population centers, as well as the topography of the area, the only way the market can be viably served by LPTVs is through the use of multiple stations, a "local network" if you will. In order to attract major advertisers, it was essential for Una Vez Mas to have the ability to sell the DMA as a whole. In 2006, Una Vez Mas strategically acquired the Stations, as well as KZDF-LP, investing more than $2.5 million to get this Santa Barbara cluster up and running. Network programming was picked up through a receive station in Santa Barbara, which was then fed through a system of microwave facilities to the smaller communities. Certain of the Stations were taken off the air for certain periods post-closing as existing equipment was restored and the microwave system was built, which took almost a year.

Then came a devastating economic downturn no one could predict. The hostile operating environment for the Stations was viciously compounded by the infamous Santa Barbara "Tea Fires" in November 2008, which burned the Santa Barbara hub facility to

the ground. As a result, Una Vez Mas was forced to apply for temporary special authority to go silent while it rebuilt its base of operations so that it could continue providing service on the Stations. Aside from the considerable technical setbacks the utter destruction caused by the fire created, market conditions continued to deteriorate. It is well-documented that even established Spanish-language broadcasters Entravision and Univision, who operate full-power stations, faced considerable financial woes in the beleaguered Santa Barbara-Santa Maria-San Luis Obispo market and were forced to make drastic cuts, including pulling the plug on local news.[7]

Given this untenable position, Una Vez Mas did all it could do to position the Stations to return to the air. As part of its strategic plan, Una Vez Mas refocused its efforts to acquiring distressed full-power television properties with more likelihood of near-term profitability (with financing limited to full-power television acquisitions only), and is now operating full-power stations in Houston, Dallas, and San Francisco. These new full-power Azteca America flagship affiliates have had little time to take root.

Nonetheless, with the promise of full-power anchor stations in major markets, a date certain for the low-power DTV transition, an uptick in the economy, promised protection for Class A television stations in spectrum repacking, and an increasing appetite for Spanish-language programming in the U.S., Una Vez Mas now has been able to reinvest in the Stations and to overcome those circumstances that in recent years have conspired to render the company able to do little more than preserve the Stations' licenses

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[7] *See* Lara Cooper, *Financial Woes Threaten to Take Central Coast's Only Spanish TV News Show Off the Air*, Noozhawk.com, Dec. 19, 2011, *available at* http://www.noozhawk.com/article/121911_noticias_univision_costa_central/; *No Chance to Save Spanish News Department at KPMR*, KCOY.com, Dec. 26, 2011, *available at* http://www.kcoy.com/story/16395559/no-chance-to-save-spanish-broadcasting-station-kpmr.

consistent with Commission policy and precedent. Although Una Vez Mas was able to temporarily restore service on each of the Stations, as duly detailed in its notices to the Commission, it did not restore service on a permanent basis until January of this year. But with the reintroduction of the Stations, Azteca America has become an attractive option for the many Hispanics in Atascadero, Santa Maria, Lompoc, Paso Robles, and San Luis Obispo, who have had limited viewing choices, and the Hispanic television marketplace in the DMA has become more diverse and competitive, consistent with the Commission's objectives. Moreover, the Stations are providing news and public affairs programming.

A scarce two months after they returned to air, *without warning*, the Commission pulled the rug out from under these Stations by issuing the *Show Cause Order*. As a result, with spectrum auctions and repacking on the horizon, the Stations face a new threat to their survival, one which will at a minimum thwart investment in their continued operation and eviscerate their value. At bottom, the *Show Cause Order* proposes to revoke station licenses from a broadcaster that in good faith believed it was *fully complying* with the Commission's rules and availing itself of an appropriate mechanism to weather the storm created by the economy, exacerbated by the wildfires, and prolonged by the considerable uncertainty created by the National Broadband Plan and the Commission's own policies with respect to the digital transition for low-power television.[8] As will be demonstrated below, to convict Una Vez Mas of a hanging

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[8] Any claim by the Commission to the contrary notwithstanding, the reclassification penalty proposed in the *Show Cause Order* would effectively amount to a revocation of the Stations' licenses, subjecting them to possible permanent displacement in the forthcoming repacking of the broadcast spectrum and, at the very least, further uncertainty until that process is complete, as well as the familiar weakened position in the capital markets that the CPBA sought to address by commissioning the issuance of "permanent" licenses.

offense under these circumstances, just as the Stations are finally seeing the light at the end of the tunnel, violates due process, singles out Class A stations for unfair, unjust, and disparate treatment, frustrates Congress' intent in issuing permanent Class A licenses, and will deprive Hispanic viewers in the DMA of a valuable programming option.

III. THE COMMISSION LACKS A VALID BASIS UPON WHICH TO RECLASSIFY THE STATIONS.

The *Show Cause Order* identifies a singular basis for the proposed reclassification: that during the periods that the Stations were silent they did not comply with the Commission's programming requirements for Class A stations.[9] This is an illogical premise in the extreme. The notion that a station can be subject to punitive action for failing to meet specific programming requirements while it is silent is preposterous. Nor has the Commission adhered to this principle in the past. To the contrary, during the 2004-2007 renewal cycle, rather than reclassifying Class A stations that had been silent during the prior license term, the Commission renewed the stations' licenses.[10] Similarly, in the case of a full-power station that reported significant periods

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[9] *Show Cause Order* at ¶ 7.

[10] Based on records reviewed in the Commission's CDBS database, numerous Class A stations received license renewals following extended periods of being silent under granted Silent STAs. For example, the Commission granted the license renewal application of Class A station WQQZ-CA, Ponce, Puerto Rico, (Fac. ID 32142) on April 12, 2005 despite the station's history of being silent for significant periods between September 2001 and March 2002 and between September 2003 through and including the date it filed its renewal application on September 30, 2004 (BRTTA-20040930ADQ). Station KGBS-CA, Austin TX (Fac. ID 38562) received grant of its renewal application in March 2007 after a year under Silent STA (BRTTA-20060403BJV). Class A station WKGK-LP, Kokomo, IN (Fac. ID 34895) had been under Silent STA virtually continuously since December 2004 and was silent when it filed its renewal application in March 2005 (BRTTA-20050328ALI). The application was granted in September 2008. Finally, Class A station WKOG-LP, Indianapolis, IN (Fac. ID 34894) was silent when it filed its renewal application in August 2005. The station operated virtually continuously under Silent STA beginning in September 2004 and for much of 2005 and 2006. Nonetheless, its renewal was granted in March 2007. Una Vez Mas has not reviewed the license files of these stations, but an online search does not disclose that any of these grants came with sanctions, admonishments, or any indication from the agency that continued adherence to the Commission's rules for notice and request for silent authority did not or would not in the future apply to Class A stations.

when it was silent and requested STAs pursuant to the rules, the Commission renewed the station's license without so much as an admonishment.[11] Thus, even if the current proposal to reclassify the Stations were comprehensible, it is incumbent on the agency to clarify the inconsistency with prior practice *before* enforcing such drastic measures.[12] Reclassifying the Stations as low-power television stations is inappropriate in light of their compliance with—and, as importantly, their reliance on the continued applicability of—the rules for full-power television stations, as dictated by the CPBA.

The Commission's STA rules unambiguously permit stations to request permission from the Commission to "go silent." Under Section 73.1635, the agency may grant an STA for a variance "from the terms of the station authorization or requirements of the FCC rules applicable to the particular class or station."[13] The ability of a station to request an STA to go silent is restricted only by the statutory provision, as reflected in the

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[11] Full-power television station WEDY, New Haven CT (Fac. ID 13595) received a grant of its renewal in June 2009 despite having been silent all or most of the period from July 31, 2005 through and including the date it filed its renewal application on November 29, 2006 (BRET-20061129AGJ). Neither penalty or admonishment accompanied the grant.

[12] *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Order, 19 FCC Rcd. 4975, ¶ 15 (2004) ("But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding . . . . Given, however, that Commission and staff precedent prior to our decision today permitted the broadcast at issue, and that we take a new approach . . . , [the licensee] did not have the requisite notice to justify a penalty." (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000))); *id.*, Statement of Chairman Michael K. Powell, 19 FCC Rcd. at 4988 ("In administering our authority, the Commission must afford parties fair warning and due process and not let our zeal trample these fundamental protections. Given that today's decision clearly departs from past precedent in important ways, I could not support a fine retroactively against the parties."); *see also Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, ¶¶ 111,124, 136, 145 (2006) (declining to issue forfeiture orders against licensees for indecency violations because existing precedent would have permitted the broadcasts and penalties would amount to retroactive sanctions) ("*Omnibus Order*").

[13] 47 C.F.R. § 73.1635(a).

rule, that the licensee must not "fail to transmit broadcast signals for any consecutive 12-month period."[14]

The Commission frequently has encouraged stations to request a silent STA when it is required by the circumstances. In fact, a 2009 Media Bureau Public Notice instructed stations forced off the air by the California wildfires (such as the Stations) to notify the agency if they "discontinued operations as a result of fire damage" and to request authority to deviate from the Commission's minimum operating rules, if necessary.[15] Accordingly, to protect the Stations' licenses during periods when they were not operating, Una Vez Mas complied in all respects with the Commission's procedures for obtaining special temporary authority to remain silent, making certain not to exceed at any time the twelve month statutory limit on such silence. Unavoidably, while under STA, the Stations ceased programming.

As the Commission concedes in the *Show Cause Order*, the Stations timely notified the FCC and requested the appropriate authority to remain silent at all times

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[14] 47 C.F.R. § 73.1635(a)(4); 47 U.S.C. § 312(g). In the *Show Cause Order*, the Commission quotes a footnote from the *Order on Reconsideration* stating that an STA is only available "in appropriately compelling circumstances involving a temporary inability to comply." *Show Cause Order* at ¶ 7 (quoting *Order on Reconsideration* at 8257, n.76). However, Section 73.1635 contains no such standard for granting an STA. *Compare* 47 C.F.R. § 73.1635(a)(2) (requiring that applicants in the broadcast services specify the "necessity for the requested STA") *with* 47 C.F.R. § 25.120(b)(1) ("The Commission may grant a temporary authorization [in the satellite service] only upon a finding that there are *extraordinary circumstances* requiring temporary operations in the public interest . . . .") (emphasis added). If the Commission intended the language in a footnote of the *Order on Reconsideration* to change the policy for granting STAs to Class A stations, it failed to provide proper notice. *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1362 (D.C. Cir. 1993) (reversing a Commission decision regarding the timely filing of applications which was based on one footnote in the order); *see also Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 630 (D.C. Cir. 2000) (finding that a license applicant did not have fair warning that a non-profit station with minorities constituting the majority of its board was not minority controlled when notice was only provided in a footnote reference to a policy statement).

[15] *See Media Bureau Announces Procedures to Assist Television and Radio Broadcast Stations in Areas Impacted by California Wildfires*, Public Notice, 24 FCC Rcd. 11320 (MB 2009).

when they were not broadcasting, including post-acquisition and during the buildout of the microwave facilities, and after the California wildfires. Specifically:

- **KASC-CA.** Station KASC-CA went silent on December 4, 2006, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.[16] The station resumed operations on November 16, 2007. On November 12, 2008, as a result of the California wildfires, Una Vez Mas again took station KASC-CA silent, pursuant to which it applied for and the Commission granted an STA.[17] Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KASC-CA.[18]
- **KLDF-CA.** Station KLDF-CA went silent on August 1, 2006, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.[19] The station resumed operations on January 10, 2007. On November 13, 2008, as a result of the California wildfires, Una Vez Mas again took station KLDF-CA silent, pursuant to which it applied for and the Commission granted an STA.[20] Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KLDF-CA.[21]

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16 *See Show Cause Order* at 2; FCC File Nos. BLSTA-20061204AGL and BLESTA-20070604ACP.

17 *See Show Cause Order* at 3; FCC File No. BLSTA-20081114AAV.

18 *See* FCC File Nos. BLESTA-20090427ACS, BLSTA-20091103ACX, BLESTA-20100421ACA, BLSTA-20110128ADU. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

19 *See Show Cause Order* and 2; FCC File No. BLSTA-20060817ABN.

20 *See Show Cause Order* at 3; FCC File No. BLSTA-20081114AAQ.

21 *See* FCC File Nos. BLESTA-20090427ACU, BLSTA-20091103ACY, BLESTA-20100422AAP, BLSTA-20110128ADY. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

- **KDFS-CA.** As a result of the California wildfires, station KDFS-CA went silent on November 13, 2008, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.[22] Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KDFS-CA.[23]
- **KPAO-CA.** As a result of the California wildfires, station KPAO-CA went silent on November 12, 2008, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.[24] Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KPAO-CA.[25]
- **KSBO-CA.** As a result of the California wildfires, station KSBO-CA went silent on November 12, 2008, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.[26] Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KSBO-CA.[27]

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22 *See Show Cause Order* at 3; FCC File No. BLSTA-20081114AAY.

23 *See* FCC File Nos. BLESTA-20090427ACV, BLSTA-20091103ADC, BLESTA-20100422AAS, BLSTA-20110128ADS. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

24 *See Show Cause Order* at 3; FCC File No. BLSTA-20081114AAT.

25 *See* FCC File Nos. BLESTA-20090427ACW, BLSTA-20091103ADA, BLESTA-20100421ACB, BLSTA-20110128ADX. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

26 *See Show Cause Order* at 3; FCC File No. BLSTA-20081114AAS.

27 *See* FCC File Nos. BLESTA-20090427ACT, BLSTA-20091103ADB, BLESTA-20100421ACD, BLSTA-20110128ADP. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

Importantly, as stated above, each of the Stations resumed full-time operations between January 18 and 19, 2012—almost two months before the Commission released the *Show Cause Order*.[28]

The Commission cannot and does not contend that the Stations failed to properly notify the agency and request a silent STA, nor that that the Commission declined to grant such authority. Rather, the Commission abruptly and inexplicably changes course and contends that Una Vez Mas "should have notified the Commission of [the Stations'] inability to meet the ongoing Class A eligibility requirements and requested a change in [the] stations' status from Class A to low-power."[29] Thus, it appears to be the agency's view that Una Vez Mas was still subject to "the ongoing Class A eligibility requirements" while the Stations were silent and despite (i) timely notifications of silent status; (ii) timely requests for silent STAs for each station; (iii) compliance with the announced policy of the Commission following the California wildfires; and (iv) the Commission's grant of the STA applications.[30] This stance ignores the fact that by the terms of the Commission's own rules, the STAs provided Una Vez Mas with authority to operate the Stations "at variance from the terms of the . . . requirements of the FCC rules applicable

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28 *See Show Cause Order* at 3. The Commission's assertion that the Stations' inability to broadcast "was due to the Licensees' business decisions to cease operations for financial reasons and not to timely resolve unidentified technical difficulties" is not borne out by the facts. The Stations required significant technical work post-acquisition, and subsequently were again forced off the air due to the California wildfires. Their ability to resume operations was further hampered by the unprecedented economic climate.

29 *See id.*

30 The Commission's letters granting the STAs expressly recognized that each was a "request for Special Temporary Authority" for a "Class A Television" "to remain silent." *See, e.g.*, Letter from Hossein Hashemzadeh, Associate Chief, Video Division to Una Vez Mas Paso Robles License, LLC (Nov. 10, 2009). The letters specifically note the two rules that continue to apply while stations remain under silent authorization: (1) filing of renewal applications and (2) proper maintenance of tower illumination. Ongoing compliance with these rules is appropriate, as they do not depend on the stations actually being on the air.

to the particular class of station."[31] On its face, moreover, the Commission's standpoint is internally inconsistent. It is inconceivable that the Stations would have been required to program for 18 hours per day with 3 hours of local programming per week *when, consistent with the rules and with the Commission's approval, they were not broadcasting at all.*

Under these circumstances, the unjustly severe penalty proposed in the *Show Cause Order*—removing the Stations' permanent Class A status—is indefensible. As reclassified LPTV stations, the Stations would have no protection when the Commission repacks the broadcast spectrum. Thus, contrary to the agency's prior contention that "Class A licensees will not be subject to loss of license for failure to" meet the ongoing Class A programming requirements,[32] reclassification will likely amount to a loss of license for some, if not all, of the Stations.[33] Short of denial of license renewal—a rare occurrence requiring a finding of a serious pattern of abuse—this penalty exceeds any imposed upon full-power stations or any other broadcast licensee, for that matter.[34]

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31 47 C.F.R. § 73.1635(a).

32 *See Establishment of a Class A Television Service*, Order on Reconsideration, 16 FCC Rcd 8244, ¶ 34 (2001) ("*Order on Reconsideration*").

33 *See* Jonathan Make, *Media Bureau Keeps LPTV In Mind As It Seeks Repacking*, Communications Daily, Sept. 27, 2011 ("[FCC] [s]taffers said not all LPTV stations may be able to stay on-air after repacking.").

34 The Commission has described license revocation proceedings as "an extraordinary sanction" warranted only by "egregious" misconduct, *see C&W Communications*, Order, 20 FCC Rcd 5586, ¶ 9 (2005), and the conduct of Una Vez Mas with respect to the Stations cannot reasonably be likened to instances in which the Commission has resorted to license revocation proceedings. *Cf. Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520 (2011) (initiating a license revocation hearing based on the licensee's repeated misrepresentations to the FCC and violation of designated entity rules); *Contemporary Media, Inc.*, 13 FCC Rcd. 14437, ¶ 1 (affirming revocation of licenses for "violations of law relating to repeated sexual abuse of children by the stations' sole owner and misrepresentations by the Licensees").

In proposing to effectively revoke the license of the Stations for going silent, the Commission is singling out Class A stations for differential treatment. The Commission's STA rule is not service specific. The rule, which falls under "Subpart H – Rules Applicable to All Broadcast Stations," permits *any* station to request special temporary authority. In practice, however, the actions proposed in the *Show Cause Order* would at best create two different silent STA rules—one for Class A television stations and one for everyone else. At worst, in view of the projected outcome, they would deny the option of going silent to Class A stations entirely. Moreover, when a full-power station goes silent, the Commission's policy "favor[s] the resumption of broadcast operations."[35] Yet, in the present situation, despite the fact that the Stations resumed broadcast operations almost two months before the issuance of the *Show Cause Order*, the Commission responded by placing the Stations' continued viability in doubt by proposing to revoke their Class A status.[36] This is the type of differential treatment, without valid justification, for which courts have previously chastised the agency.[37]

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35 *See Birach Broadcasting Corp.*, 16 FCC Rcd. 5015 ¶ 13 (2001).

36 In the full power context, there are numerous examples of stations silent for extended periods that remain silent today or have returned to the air without incident and certainly without threat of loss of license or a reclassification that carries the substantial risk of loss of economic viability. Station WKQX(FM), Watseka, IL (Fac. ID 164237) has been off the air for all but three days of the last four years. Station WBHA(AM), Wabasha, MN (Fac. ID 54624), which was recently approved for sale, was dark for all but three days in the three and a half years prior to the sale. Similarly, station WASG(AM) was silent virtually continuously for the four years prior to its sale in 2011. Full power television station KCFG, Flagstaff, AZ (Fac. ID 35104) has operated for less than one month in the last two and a half years. Full power television station WFXU, Live Oak, FL (Fac. ID 22245) has been silent for 36 months during the last five years. Notably, stations WKQX and WBHA cited financial hardship as the reason for their continued silence.

37 *See Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965); *Communs. & Control, Inc. v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) (FCC must explain why it demands strict adherence from some licensees, but not all).

Additionally, the Commission provided no advance notice to Una Vez Mas and similarly situated licensees that adherence to the STA procedures would produce such dire consequences. Imposing such a heavy-handed penalty without providing reasonable notice to affected parties violates fundamental notions of due process. As the agency has recognized, "Fairness demands explicit notice for a severe sanction . . . ."[38] There is clear tension between the Commission's rule permitting stations to go silent, in order that they may operate at variance "from . . . the rules applicable to the particular class or station" and its assertion that Section 73.6001 requires adherence to the Class A eligibility *and program service* requirements at all times, even when a station is not operating and under an STA.

Una Vez Mas' actions were entirely reasonable given Commission precedent. In the twelve years since the Commission adopted the Class A rules, to the best of Una Vez Mas' knowledge, the agency has *never* reclassified a station solely because the station was silent and was therefore unable to comply with the minimum programming requirements. As a result, Class A licensees have reasonably relied on the assumption that a station that was silent pursuant to an STA was *not* subject to reclassification for failing to comply with Section 73.6001.[39] Where, as here, notice of the Commission's

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[38] *Rev. Robert Owens, Philos Broadcasting Company, Inc.*, 21 FCC Rcd. 7977 (2006); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) ("an agency may not . . . depart from a prior policy *sub silentio*") (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

[39] The extent and scope of this confusion is evidenced by the fact that, in addition to the five Class A stations referenced in the instant *Show Cause Order*, there are at least 24 other stations to which the Commission has issued similar show cause orders for failing to comply with Section 73.6001 while they were under Silent STA. *See Reclassification of License of Class A Television Station KVTF-CA Brownsville, Texas*, Order to Show Cause, DA 12-530 (Apr. 3, 2012); *Reclassification of License of Class A Television Station WZGS-CA, Raleigh, North Carolina*, Order to Show Cause, DA 12-484 (Mar. 29, 2012); *Reclassification of License of Class A Television Station WHDO-CA, Orlando, Florida*, Order to Show Cause, DA 12-483 (Mar. 29, 2012); *Reclassification of License of Class A Television Station KXLK-CA Austin, Texas*, Order to Show Cause, DA 12-439 (Mar. 23, 2012); *Reclassification of License of Class*

expectations is demonstrably deficient and the proposed sanction is as severe as reclassification (raising, as it does, the specter of ultimate annihilation), "elementary fairness" demands that the Commission adopt a softer, reasoned approach.[40]

IV. THE PROPOSED RECLASSIFICATION IS INCONSISTENT WITH THE COMMUNITY BROADCASTERS PROTECTION ACT'S PURPOSE AND THE COMMISSION'S COMMITMENT TO DIVERSITY AND LOCALISM.

It would contravene both the purposes of the CBPA and the Commission's own diversity and localism objectives to undermine Una Vez Mas' continued ability to provide Spanish-language programming to underserved Latino communities by reclassifying the Stations. In the *Class A Establishment Order*, the Commission stated that many LPTV stations eligible for Class A status "often provide 'niche' programming to residents of specific ethnic, racial, and interests communities."[41] Further, in the *Order* implementing the CBPA, the Commission recognized that providing additional protection to certain stations would advance the agency's "fundamental goals of ensuring diversity and localism in television broadcasting."[42]

A Television Station KXCC-CA Corpus Christi, Texas, Order to Show Cause, DA 12-431 (Mar. 21, 2012); *Reclassification of License of Class A Television Stations KTJA-CA Victoria, Texas*, Order to Show Cause, DA 12-427 (Mar. 20, 2012); *Reclassification of License of Class A Television Station WGSA-CA Savannah, Georgia*, Order to Show Cause, DA 12-398 (Mar. 14, 2012); *Reclassification of License of Class A Television Station WJJN-LP Dothan, Alabama*, Order to Show Cause, DA 12-399 (Mar. 14, 2012); *Reclassification of License of Class A Television Station KPAL-LP Palmdale, California*, Order to Show Cause, DA 12-386 (Mar. 12, 2012); *Reclassification of License of Thirteen Class A Television Stations Licensed to L4 Media Group, LLC*, Order to Show Cause, DA 12-384 (Mar. 12, 2012); *Reclassification of License of Class A Television Stations WKOG-LP Indianapolis, Indiana WKGK-LP Kokomo, Indiana*, Order to Show Cause, DA 12-383 (Mar. 12, 2012).

40 *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). Notably, the Commission will appropriately grant a waiver where its notice was insufficient due to confusion over ambiguous rules. *See American Family Association*, 19 FCC Rcd. 18681 (2004).

41 *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, ¶ 1 (2000).

42 *Id.*

Preserving the Stations' Class A status is consistent with these policy goals and objectives. Since it acquired the Stations, as evidenced by its considerable upfront investment, Una Vez Mas has had every intention of bringing Azteca America's unique programming to Hispanic viewers along California's Central Coast. Unhappily, the destruction inflicted by the California wildfires and the unprecedented economic environment of the past several years have been, until recently, virtually insurmountable obstacles to Una Vez Mas' launch of Spanish-language programming—both locally produced programming and Azteca America network programming—to the large Hispanic population in the Santa Barbara-Santa Maria-San Luis Obispo DMA. Now, Una Vez Mas brings to the market Azteca America's nightly national newscast and plans to launch a local half hour newscast on the Stations in January 2013. Moreover, the Stations are carrying local health council and board of supervisors meetings.

The promise that Class A stations will uniquely further the Commission's diversity and localism objectives[43] by affording unserved communities increased, targeted television programming offerings is even more critically important now than it was when envisioned by Congress twelve years ago.[44] For example, the niche audience served by Azteca America affiliates has boomed since the rules' inception, with the United States Hispanic population growing from 32.8 million in 2000 to 48.9 million in

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[43] *See, e.g., 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 11464, ¶ 1 (2011) ("Our challenge in this proceeding is to . . . ensur[e] that our media ownership rules continue to serve our public interest goals of competition, localism, and diversity.").

[44] *See, e.g., Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (reforming the Universal Service Fund and intercarrier compensation mechanism to facilitate broadband access to unserved Americans).

2010.[45] Moreover, a disproportionately large segment of Spanish language speakers living in the United States rely exclusively on over-the-air television for video service compared to the general population.[46] It would be a disservice to this burgeoning, underserved segment of the U.S. population to eliminate an important source of programming in these markets just as Una Vez Mas has regained the necessary stability to fulfill the initial visions of Congress and the Commission for Class A television stations.

Regardless, the Commission has effectively sentenced the Stations, and Una Vez Mas' plans for the DMA, to death. Any change to the Stations' Class A status would at the very least shrink available capital, foreclose any prospect of a return on investment, and potentially shut down the Stations, depriving Hispanic audiences, whose viewing choices are particularly limited, from an alternative programming source, contrary to the Commission's goal of "provid[ing] stability and a brighter future to . . . stations that provide valuable local programming services in their communities."[47]

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[45] Census.gov, Melissa Therrien and Roberto R. Ramirez, *The Hispanic Population in the United States* (Mar. 2000), *available at* http://www.census.gov/population/www/socdemo/hispanic/ho00.html; Census.gov, *The Hispanic Population in the United States: 2010 Detailed Tables* (Mar. 2010), *available at* http://www.census.gov/population/www/socdemo/hispanic/cps2010.html.

[46] *OTA TV Homes Include 46 Million Consumers*, TVNewsCheck.com (June 6, 2011) ("[S]ome minority groups are more dependent on broadcast reception than the general population, including . . . 23% of Hispanic homes . . . , a proportion that increases to 27% among homes in which Spanish is the language of choice."), *available at* http://www.tvnewscheck.com/article/2011/06/06/51686/ota-tv-homes-include-46-million-consumers; *see also Digital Broadcast Television Transition Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition*, U.S. Government Accountability Office, GAO-05-258T, at 4 (Feb. 17, 2005) ("Additionally, non-white and Hispanic households are more likely to rely on over-the-air television than are white and non-Hispanic households."), *available at* http://www.gao.gov/new.items/d05258t.pdf.

[47] *Id.*, ¶ 123.

V. THE COMMISSION'S INTERPRETATION OF THE "ONGOING CLASS A ELIGIBILITY REQUIREMENTS" CONTRADICTS THE UNAMBIGUOUS INTENT OF CONGRESS IN THE COMMUNITY BROADCASTERS PROTECTION ACT.

The underpinnings for the reclassifications proposed in the *Show Cause Order* are legally without merit because they rely exclusively on Section 73.6001(b) of the Commission's rules, which originates from an invalid exercise of agency power. Undeniably, the so-called "ongoing Class A eligibility requirements" exceed any programming requirements governing full-power television stations. As such, they run directly counter to the clear intent of Congress that Class A licenses shall remain ***permanent*** as long as the licensee remains in compliance with the applicable rules for full-power stations. Congress expected that certain rules applicable to full-power stations would not apply to Class A stations (for example, by virtue of the latter's reduced power). At the same time, Congress did not intend that there would be *additional* rules, beyond those applicable to full-power stations, that would apply to Class A stations. In particular, it is disingenuous to suggest that Congress intended to subject Class A stations to even more stringent operating requirements than imposed on full-power television stations, given Congress' express recognition of the fragility of the market that spawned them and the clear applicability of the 12-month statutory limit on silence to *all* broadcast licensees.

In adopting rules and regulations, the Commission is limited to the powers granted to it by Congress.[48] Where the plain meaning of a statute "directly addres[ses] the precise question at issue," the agency and reviewing courts "must give effect to the

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48 *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

unambiguously expressed intent of Congress."[49] Where the "intent of Congress is clear, that is the end of the matter."[50] A statute is ambiguous when "the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms."[51] Put another way, a statute "foreclose[s] the agency's statutory interpretation" when it "prescrib[es] a precise course of conduct other than the one chosen by the agency . . . ."[52]

The Community Broadcasters Protection Act of 1999, as codified at 47 U.S.C. § 336(f), prescribes a precise course of conduct for the Commission, providing no discretion for the agency to impose requirements upon Class A stations beyond those provided in the statute. First, the statute establishes narrow boundaries for the Commission's implementing rules. Specifically, it provides that:

> (i) the licensee shall be subject to the same license terms and renewal standards as the licenses for full-power television stations . . . ; and
>
> (ii) each such class A licensee shall be accorded primary status as a television broadcaster ***as long as the station continues to meet the requirements for a qualifying low-power station*** . . . .[53]

With respect to the "requirements for a qualifying low-power station," the statute also enumerates specific requirements:

> a station is a qualifying low-power television station if –
> (i) during the 90 days preceding November 29, 1999--

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49 *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

50 *Id.*; *see also Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (holding that if the statute is not ambiguous, "we stop the music at step one").

51 *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999).

52 *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal citations and quotations omitted).

53 47 U.S.C. § 336(f)(1)(A) (emphasis added).

(I) such station broadcast a minimum of 18 hours per day;
(II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station . . .; and
(III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and

(ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full power television stations . . . .[54]

Taking these provisions together, Congress established a two-step eligibility requirement for Class A stations. First, from August 31, 1999 through November 29, 1999, a station must have broadcast a minimum of 18 hours per day, including an average of 3 hours per week of programming produced within the station's market area, and complied with all applicable LPTV requirements. Then, from the date of its application, the station must comply with all applicable rules for full-power television stations. The Commission has recognized this two-step requirement both in the *Order* implementing the CBPA and in its *Order on Reconsideration.*[55]

This interpretation of the plain text of the statute is consistent with Congress' intent to create "a ***permanent*** Class A license for qualifying low-power stations."[56] At the time of the CBPA's passage, the more than 2,000 licensed and operational LPTV stations faced an uncertain future as the result of the issuance of companion digital

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[54] 47 U.S.C. § 336(f)(2). While the statute permits the Commission to expand the definition of a qualifying low-power television station if it determines that such a designation would serve the public interest, convenience, and necessity, *see* 47 U.S.C. § 336(f)(2)(B), there is no provision by which the Commission can adopt a narrower definition of a qualifying low-power television station.

[55] *See Class A Television Service*, Report and Order, 15 FCC Rcd. 6355 ¶ 15 (2000) ("*Class A Order*"); *Establishment of a Class A Television Service*, Order on Reconsideration, 16 FCC Rcd. 8244 ¶ 25 (2001) ("*Order on Reconsideration*") ("To qualify for Class A status, the CBPA provides that, during the 90 days preceding enactment of the statute, a station must have been in compliance with the Commission's requirements for LPTV stations. In addition, beginning on the date of its application for a Class A license and thereafter, a station must be 'in compliance with the Commission's operating rules for full-power stations.'").

[56] Report of the Committee on Commerce, Science, and Transportation, S. Rep. 105-411 1 (1998).

channels to every analog station to facilitate the digital transition. This doubling of the number of allocated television channels threatened to displace many LPTV stations.[57] Congress recognized that the resulting uncertainty made it difficult, if not impossible, for LPTV stations to obtain access to much-needed capital.[58] Accordingly, Congress sought, through the CBPA, to provide "regulatory certainty" to the stations and their investors by subjecting their licenses to the same license terms and renewal standards as full-power stations.[59]

Congress was unable, however, to provide permanent status to *all* LPTV stations because of the scarcity of channels, which would be compounded by the addition of companion digital channels.[60] Accordingly, Congress established the criteria described above to qualify those LPTV stations that it determined were most worthy of receiving the full protections accorded to full-power television stations. Congress anticipated and intended that these criteria would limit the number of LPTV stations eligible for permanent Class A licenses to between 200 and 400 stations.[61] Once these stations were selected, however, Congress intended that they would "assume the same duties and responsibilities as their full-power counterparts."[62]

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57 Section-by-Section Analysis to S. 1948, the Act known as the "Intellectual Property and Communications Omnibus Reform Act of 1999," as printed in the Congressional Record of November 17, 1999 at pages S 14707-14726 ("Section-by-Section Analysis"), at S 14724-14725.

58 *Id.* at 14725.

59 *Id.*

60 Report of the Committee on Commerce, H. Rep. 106-384, at 6 (Oct. 14, 1999) ("The Committee recognizes that, because of emerging DTV service, not all LPTV stations can be guaranteed a certain future.").

61 Report of the Committee on Commerce, Science, and Transportation, S. Rep. 105-411, at 2 (Oct. 12, 1998.

62 *Id.*

Despite the clear language of the statue and the express Congressional intent that the programming requirement only serve as an initial screen for Class A eligibility, the Commission adopted it as an "ongoing" requirement for Class A stations. In so doing, the agency wrongly stated that the CBPA "requires that Class A licensees continue to meet the eligibility criteria established for a qualifying low-power station in order to retain Class A status."[63] In fact, the statute demands that Class A stations continue to meet the "requirements" for a Class A station, not the "eligibility criteria."[64] Once a Class A station filed its application, its ongoing "requirements" are the applicable rules for full-power television stations.[65] As demonstrated above, Una Vez Mas' actions with respect to the Stations were entirely consistent with the applicable rules for full-power stations, whose licenses would not be in jeopardy for failure to remain on the air unless such failure extended beyond twelve consecutive months, as clearly established by Congress.[66]

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63 *Class A Order* at ¶ 30.

64 *See* 47 U.S.C. § 336(f)(1)(A)(ii).

65 47 U.S.C. § 336(f)(2)(A). The Commission's prior dismissal of this common-sense reading of the statute cannot withstand scrutiny. In response to a Petition for Reconsideration filed by Univision, the Commission offered two justifications for its "ongoing Class A eligibility requirements": *first*, that under the CBPA, licensees must "'continue' to meet the qualifying low-power station eligibility criteria" and, *second*, that relieving stations of the local programming requirements "would be inconsistent with the overall intent of the CBPA." As explained above, the CBPA clearly defined the ongoing obligations of Class A stations as "the Commission's operating rules for full-power stations." This is consistent with Congress' intent not to create a special class of stations with additional burdens and fewer benefits than full-power stations, but rather to establish an initial limiting mechanism for stations that would receive most of the benefits and all of the relevant obligations of their full-power brethren. Certainly, consistent with the rules imposed on full-power television stations, whether or not a Class A television station is serving the public interest may appropriately be considered through the license renewal process. But because the Commission's ongoing programming requirement for Class A stations exceeds those "duties and responsibilities" applicable to full-power stations, they are invalid as a matter of law and unenforceable under the present circumstances

66 *See* 47 U.S.C. § 312(g).

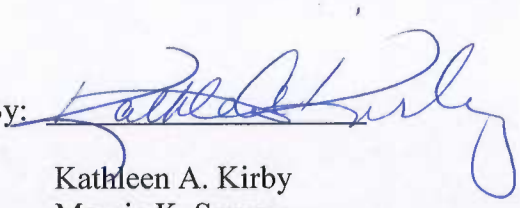
To the extent the Commission's intent in issuing the *Show Cause Order* is to use the letter of Section 73.6001(b) to weed out "bad actors" that have no intent of utilizing the spectrum licensed to them for its intended purpose, its actions are misguided in the case of the Stations. As demonstrated herein, Una Vez Mas was and is a committed broadcaster, and it did what it reasonably believed it, as a Commission licensee, was required and permitted to do to preserve its licenses in the face of calamitous circumstances. It has since returned the Stations to full time operation, and the Stations are operating in compliance the rules governing full-power television stations, including those embodied in Section 73.6001(b). Nonetheless, should the Commission determine that the "continuing eligibility" requirements of the rule apply, Una Vez Mas alternatively requests a waiver of those rules based upon the facts presented herein and its reasonable belief that it was acting in concert with established Commission precedent.

VI. CONCLUSION

For the foregoing reasons, Una Vez Mas respectfully requests that the Commission preserve the Stations' Class A licenses and, if necessary, grant a retroactive waiver of Section 73.6001 of the Commission's rules.

Respectfully Submitted,

UNA VEZ MAS, LP

By: 

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April 23, 2012

DECLARATION OF TERENCE CROSBY

Terence Crosby hereby declares under penalty of perjury that:

1. I am Chief Executive Officer of Una Vez Mas, LP.

2. I have read the Order to Show Cause directed to Una Vez Mas, LP's affiliated licensees that was released by the Federal Communications Commission on March 15, 2012.

3. I have read the foregoing Response to Order to Show Cause.

4. The facts as stated in the Response to Order to Show Cause are true and Correct.

Executed this 23rd day of April, 2012.

Terence Crosby